Supreme Court, U.S.
FILED

041585 APR 25 2005

OFFICE OF THE CLERK

No. 05-

In the

Supreme Court of the United States

NANCY LOUISE ABERNATHY,
Petitioner

v.

PEOPLE OF THE STATE OF MICHIGAN
Respondent

On Petition for a Writ of Certiorari to the Sixth Circuit Court of Appeals

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Frank Stanley
Counsel of Record

200 North Division Avenue
Grand Rapids, MI 49503
(616) 459-8600

Counsel for Petitioner

SUPPLEMENTAL APPENDIX

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NANCY LOUISE ABERNATHY,
Petitioner-Appellant,

v.

JOAN YUKINS, WARDEN,
Respondent-Appellee
_____/

Case No. 1:01-CV-44
HON. GORDON J. QUIST

REPORT AND RECOMMENDATION

Petitioner, a prisoner currently incarcerated at a Michigan correctional facility, has filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254.

Background

Following a jury trial, petitioner was convicted of first-degree, premeditated murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), for the shooting death of her daughter-in-law. The Michigan Court of Appeals affirmed petitioner's conviction. *People v. Abernathy*, No. 204507 (Mich.App. Aug. 17, 1999). The Michigan Supreme Court subsequently denied petitioner's application for leave to appeal. *People v. Abernathy*, No. 115412 (Mich.App. Mar. 28, 2000).

Petitioner raised the following issues in his petition for writ of habeas corpus:

I. THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR WHEN HE CONCLUDED THAT TRIAL COUNSEL WAS NOT CONSTITUTIONALLY INEFFECTIVE AND WHEN HE REFUSED TO GRANT A HEARING SO THAT AN EVIDENTIARY RECORD COULD BE DEVELOPED

II. ERROR TO DENY MOTION TO SUPPRESS STATEMENTS

Discussion

I. Standard for review under 28 U.S.C. § 2254

Petitioner seeks relief under 28 U.S.C. § 2254 which states:

> [A] district judge shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Before petitioner may seek such relief in the federal court, however, she must first fairly present the substance of her claims to all available state courts, thereby exhausting all state remedies. *Picard v. Connor*, 404 U.S. 270, 277-78 (1981); *Clemmons v. Sowders*, 34 F.3d 352, 354 (6th Cir. 1994); *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994). Petitioner raised the substance of her habeas issues in the state appellate courts. Therefore, petitioner has exhausted her state remedies with respect to these claims.

Where the state court has adjudicated a claim on its merits, the federal district court's habeas corpus review is limited by 28 U.S.C. § 2254, which provides in pertinent part that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The Supreme Court has clarified that the phrases "contrary to" and "unreasonable application of" in 28 U.S.C. § 2254(d) (1) have independent meaning. *Penry v. Johnson*, 532 U.S. 782, 121 S.Ct. 1910, 1918, 150 L.Ed.2d. 9 (2001). In order for a state court to render a decision "contrary to" clearly established Supreme Court precedent, the state court must "appl[y] a rule that contradicts the governing law set forth in [Supreme Court] cases," or "confront [ ] a set of facts that are materially indistinguishable from a decision of" the Supreme Court and nevertheless arrive at a different result. *William v. Taylor*, 529 U.S. 362, 405-06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (O'Connor, J., concurring). An "unreasonable application of" clearly established Federal law may occur, in contrast, when "the state court identifies the correct governing legal principle from this Court's decision's but unreasonably applies that principle to the facts of the prisoner's case." *Id.* At 413, 120 S.Ct. 1495. An unreasonable application of law is not, according to the Supreme Court, merely, incorrect; rather, "that application must also be unreasonable." *Id.* At 411, 120 S.Ct. 1495.

Magana v. Hofbauer, 263 F.3d 542, 546-47 (6th Cir. 2001).

II. Petitioner's Claims For Habeas Relief

A. Ineffective Assistance of Counsel (Claim I)

In her first habeas issue, petitioner contends that her counsel's presentation of two purportedly inconsistent defenses deprived

her of her Sixth Amendments right to effective assistance of counsel. To succeed on an ineffective assistance of counsel challenge, petitioner must demonstrate that her counsel's performance was deficient, meaning that counsel failed to perform as a reasonably competent attorney, and that the deficient performance prejudiced her defense. *Strickland v. Washington*, 668, 688. This court's scrutiny of counsel's performance is highly differential, and the court is to presume that counsel rendered adequate assistance and made decisions with reasonable professional judgment. *Id.* at 689-690.

When determining whether counsel's performance was deficient, the Supreme Court instructs that the Court:

> ...must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.

Strickland, 466 U.S. at 690.

The Supreme Court explains prejudice as follows:

> An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. . . . It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, . . . and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. . . . The defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have

> been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 691, 693-694.

Petitioner must first show that counsel's performance was deficient. The Michigan Court of Appeals resolved this first prong of petitioner's claim of ineffective counsel as follows:

> First, defendant claims that she was denied a fair trial due to defense counsel's decision to present two purportedly inconsistent defenses at trial: One, that the murder was committed by an unknown intruder, and two, that if defendant did commit the murder she was not guilty by reason of insanity. Defendant asserts that, while defense counsel would not have been ineffective if he had chosen one defense or the other, she was prejudiced by the presentation of both defenses.
>
> We agree with the trial court's observation, in its denial of defendant's motion for a new trial on this basis, that the instant case represents the "flip side" of *People v LaVearn*, 448 Mich 207; 528 NW2d 721 (1995), in which the Supreme Court held that trial counsel was not ineffective for choosing between two weak defense strategies, neither of which had a significant likelihood of success , and in which it was not shown that counsel's choice of defense significantly affected the outcome of the trial . Here, defendant argues that defense counsel is ineffective for choosing not one of two options, but both options. We agree with the trial court's conclusion that the two defenses presented here were not, in fact, inconsistent given the unique facts in this case. Where the murder weapon was never recovered and where, absent defendant's admissions, the evidence of her guilt was mostly circumstantial, it was possible that the jury would find the physical evidence insufficient to show defendant's guilt. Furthermore, given defendant's mental history, it was possible for the jury to reject defendant's admission based on a finding that she

> was insane and find that defendant did not murder the victim. Defendant has not shown that counsel was deficient in choosing to present both defenses and has not shown the requisite prejudice, i.e., that the choice of one or the other defense would have had a reasonable probability of affecting the outcome of the trial. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 675 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Abernathy, No. 204507 (Mich. App.), slip op. at 1-2.

Petitioner identified her counsel's simultaneous presentation of the two separate defenses of insanity and innocence as the specific "act[s] or omission[s]" that rendered counsel's performance deficient. Counsel's simultaneous presentation of these two defenses certainly does not constitute deficient representation. Under the circumstances of this case, it was reasonable, albeit unsuccessful, for counsel to present both defenses. Petitioner's history of mental health problems, the lack of a murder weapon, heavy reliance upon circumstantial evidence and petitioner's admission of guilt created a unique situation where more than one explanation for petitioner's innocence was plausible. Counsel's decision to simultaneously present both defenses reflects a conscious and strategic attempt to capitalize on the unique factual circumstances of the case.

Petitioner's challenge to such decision must overcome a presumption that the challenged action might be considered sound trial strategy. *McQueen v. Scroggy*, 99 F.3d 1302, 1310-11 (6th Cir. 1996). Valid trial tactics or strategy cannot form the basis of an ineffective assistance of counsel claim. *Ray v. Holland*, 2000 WL 1290219 (6th Cir. Sept. 5, 2000); see generally *O'Hara v. Wigginton*, 24 U.S. 823 (6th Cir. 1994). Under these circumstances, petitioner has not overcome the presumption that her counsel's decision was indeed sound trial strategy.

Counsel's decision to present the two simultaneous defenses of insanity and innocence was not outside the range of professionally competent assistance. In the absence of a showing that counsel was deficient, it is unnecessary for the court to address petitioner's contention that her constitutional interests were prejudiced. See *Strickland*, 466 U.S. at 688.

The Michigan Court of Appeals' resolution of the issue was neither contrary to, or an unreasonable application of, clearly established Federal law as determined by the Supreme Court; nor was the decision based on an unreasonable determination of the facts in light of the evidence presented. See *Williams v. Taylor*, 529 U.S. 362 (2000). Accordingly, petitioner is not entitled to habeas relief on this claim.

B. Failure to Suppress Petitioner's Statements (Claim II)

In her second habeas issue, petitioner claims that her Fifth Amendment rights were violated when the trial court refused to suppress various statements she made. Specifically, petitioner challenges the trial court's admission of several incriminating statements she made both before and after the death of the victim, including: 1) A statement made to Lisa Carpenter nearly three (3) years before the victim's death, 2) statements made to police officers at the scene of the crime at the Abernathy home, 3) statements made to police officers at the station house and, 4) statements made to two fellow inmates.

Petitioner's claim essentially involves two separate contentions: 1) that petitioner's statement to Lisa Carpenter was admitted in violation of state law and, 2) that the three other statements to the police and two inmates were made involuntarily in violation of her Fifth Amendment right against self-incrimination.

1. Statement to Lisa Carpenter was properly admitted

In the first part of her second habeas claim, petitioner contends that testimony regarding her statement to Lisa Carpenter was admitted in violation of MRE 401, 402, and 403 because "[the statement] was made too remote in time. . .involved an entirely different context and totally different circumstances than the incident, and. . .was more prejudicial than probative." Brief at 45, docket no.1.

The Michigan Court of Appeals addressed this issue as follows:

> [D]efendant claims that the trial court erred in refusing to suppress various statements made by her. We conclude that the challenged statements were all properly admitted at trial.

> Generally, all relevant evidence is admissible, MRE 402, *People v. Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998), and the prosecution may offer all relevant evidence, subject to MRE 403, on every element of the crime charged. *Mills*, supra at 71.
>
> In the instant case, the intent of defendant was directly at issue because it was an element of the charged offense of first-degree, premeditated murder. MCL 750.316; MSA 28.548. The challenged statement made to Lisa Carpenter was relevant and material to show defendant's long established motive, intent and plan to kill the victim. MRE 401, MRE 803(3). See *Mills, supra; People v. Fisher*, 449 Mich 441, 452-453; 537 NW2d 577 (1995). The statement was not unfairly prejudicial pursuant to MRE 403 merely due to the passage of time because the statement was consistent with subsequent, similar statements made by defendant regarding her intense dislike of the victim and her intent to kill her. The court did not abuse its discretion in admitting defendant's statement to Carpenter.

Abernathy, No. 204507 (Mich. App.), slip op. at 3.

Petitioner's second habeas claim challenges the admission of evidence based on state law. Federal habeas review is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States. *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). "[F]ederal habeas corpus relief does not lie for errors of State law." *Id.* at 67, *quoting Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). Consequently, State court rulings on the admission of evidence are not subject to federal habeas review unless the error denied petitioner a fundamentally fair trial. *Clemmons v. Sowders*, 34 F.3d 352, 357-358 (6th Cir. 1994); *see Estelle*, 502 U.S. at 67-70. In determining whether an alleged trial error violated the Constitution, the court must "evaluate whether the error 'had substantial and injurious effect or influence in determining the jury's verdict'" *Clemmons*, 34 F3d at 357, *quoting Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). "The Petitioner must establish 'actual prejudice' to warrant habeas relief." *Id.* at 357-358.

At trial, Lisa Carpenter testified that nearly three years prior, petitioner had told her the "she would kill [her daughter-in-law] if she got a chance." Trial Trans. P. 88, Jan. 6, 1997, docket no. 16. Not only is petitioner's statement consistent with subsequent statements she made concerning her desire to murder her daughter-in-law, but it reveals a long harbored intent to commit a murder at some point in the future. While petitioner's statement and the murder itself were removed by a number of years, it does not lose its probative value in supporting a finding of petitioner's guilt. The trial court judge properly noted that "the principal value of the Lisa Carpenter testimony is that it indicates the beginning point of Mrs. Abernathy's expressed distress with her daughter-in-law." *People v. Abernathy*, Pretrial Motion Trans. At 7, Jan. 22, 1997, docket no. 22. Therefore, it was perfectly plausible for the trial court to conclude that such a statement "indicate[s] the formation of an intent and even a plan and scheme as the statements further evolve with the passage of time, which would be germane and appropriate for consideration by the finder-of-fact." *Id.*

Petitioner attempts to raise a federal constitutional issue by contending that the statement to Lisa Carpenter was more prejudicial than probative. "Questions concerning the admission of evidence that may be unfairly prejudicial are committed to the sound discretion of the trial court." *Oliphant v. Koehler*, 594 F2d 547, 555 (6th Cir. 1979). Such discretionary decisions are not reviewable in a federal habeas proceeding. *Id.* Furthermore, all material evidence is prejudicial by nature. *See Kolada v. General Motors Parts Division, General Motors Corp.*, 716 F2d 373, 378 (6th Cir. 1983). Here, petitioner has failed to demonstrate that admission of these statements denied her a fundamentally fair trial. As stated by the Michigan Court of Appeals, Petitioner's statement was not unfairly prejudicial merely due to the passage of time; rather, her statements indicated her intense dislike of the victim and was consistent with later statements. Accordingly, petitioner is not entitled to habeas relief on this claim.

2. Petitioner's other statements were not involuntary

In petitioner's second habeas claim, she also contends that her three other statements were given involuntarily and admitted in violation of her Fifth Amendment right against self-incrimination.

The Michigan Court of Appeals addressed this issue as follows:

> [We] agree with the trial court's determination that defendant's statements to the police and to Tonya Bier and Cecilia Logins were not involuntary. In our examination of the voluntariness of statements, we are to examine the entire record and make an independent determination but are to give deference to the trial court's assessment of the weight of the evidence and the credibility of the witness. *People v. Sexton*, 458 Mich 43, 68; 580 NW2d 404(1998); *People v. Cheatham*, 453 Mich 1, 29-30 (Boyle. J), 44 (Weaver, J); 551 NW2d 355 (1996). After engaging in such a review, we agree with the trial court that defendant's statements were not involuntarily, were reliable, and were relevant and admissible at trial.

Abernathy, No. 204507 (Mich. App..), slip op. at 3.

The Fifth Amendment provides that "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Fifth Amendment's privilege against self-incrimination protects individuals from "informal compulsion exerted by law-enforcement officers during in-custody questioning." *Miranda v. Arizona*, 384 U.S. 436, 461 (1996). "[W]hether statements made during a custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel."[1] *Fare v.*

---

[1]As initial matter regarding all three sets of statements, petitioner contends that "because of her prior mental state including her bipolar condition, as exacerbated by her medications, [she was] precluded. . . from making voluntary statements." Pet. Brief at 47, docket no.1. When addressing the admissibility of her statements, the trial court determined that they were in no way "unreliable or the product of a diseased mind and there [was] no indication that it was the result of over medication." *Abernathy*, Pretrial Motion Trans. At 8-13, Jan. 22, 1997, docket no. 22. Even if petitioner did suffer from a mental disability at the time of her statements, a mental disability alone does not render a confession involuntary. *See United States v. Macklin*, 900 F.2d 948, 951 (6th Cir. 1990). Petitioner must also show that her admissions resulted from coercive police activity. *Id.*

Michael C., 442 U.S. 707, 724-25 (1979). *See Miranda*, 384 U.S. at 475-77.

i. Petitioner's statements to police at Abernathy home

Petitioner first contends that the admission of statements she made to police while at her home violated her Fifth Amendment right against self-incrimination. Petitioner's claim must fail, however, because her statements were not made during a custodial interrogation. *See Miranda*, 384 U.S. at 461 (1966). A custodial interrogation has been defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in a significant way." *United States v. Crosley*, 224 F3d 847, 861 (6th Cir. 2000). A review of the trial transcript reveals that petitioner was not in custody while being questioned by the police officers. *Abernathy*, Pretrial Motion Trans. at 20, Jan. 22, 1997, docket no. 22. The police officers were dispatched to the scene as a result of a 911 call made by petitioner herself. *Id.* At the time petitioner made her statements, she was in her own home sitting in the kitchen/dining room area. *Id.* Petitioner was asked "largely-routine" questions directed at "gather[ing] information as part of the initial stages of the police investigation into the shooting of [petitioner's daughter-in-law]." *Id.* Petitioner did not resist responding to any of the officer's questions and freely supplied the officer's with the information they requested. *Id.* At no time was she placed under arrest, "taken into custody or otherwise deprived of [her] freedom of action in a significant way." Under the circumstances, petitioner was not "in custody" and, as a result, the officers were not required to give *Miranda* warnings. See e.g. *United States v. White*, 270 F3d 356, 365-66 (6th Cir. 2001) (*Miranda* warning unnecessary when defendant was interviewed in her house, neither handcuffed nor physically restrained, and officers made no suggestion that she was not free to leave). Accordingly, since petitioner's statements were not made during a "custodial interrogation," the admission of these statements did not violate her Fifth Amendment rights.

ii. Petitioner's statements while at police station.

Petitioner also contends that the admission of her statements made to authorities when she was at the Sheriff's North Kent

County Substation violated her Fifth Amendment right against self-incrimination. While at her home, petitioner consented to the officer's request to go with them to the substation. *Id.* When she arrived, she was advised of her *Miranda* rights, which she waived. *Id.* at 22. Petitioner then voluntarily provided a statement detailing at length her family's financial and domestic problems, as well as the events surrounding the murder. *Id.* While the trial court found that petitioner was in a "police dominated atmosphere," the court noted that she was not under arrest. *Id.* at 21. When the interview was over, petitioner was allowed to return home without any charges being filed. *Id.* at 22. Petitioner does not contend that her waiver was invalid. Having waived her *Miranda* rights and voluntarily provided answers to police questions, I find no constitutional violation in the admission of petitioner's statements made at the police substation.

iii. Petitioner's statements to inmates

Lastly, petitioner contends that the admission of statements she made to fellow inmates Tonya Bier and C.C. Logins while being transported to the Forensic Center violated her Fifth Amendment right against self-incrimination. According to the trial transcript, Logins engaged petitioner in a conversation, during which petitioner told Logins that she had killed her daughter-in-law. Trial Trans. At 9-10, Jan. 16 1997, docket no. 20. Inmate Bier was not a part of the conversation but could hear what was being said. *Id.* at 23. As emphasized by the trial court, there was no state action involved in these statements. *Id.* at 25. Ms. Logins testified that petitioner appeared to be cognitive during their conversation and that her statement's were not " the product of delusion or anything of the sort." *Id.* In short, petitioner presents no evidence of government involvement in her conversation with Bier and Logins. Petitioner is entitled to a *Miranda* warnings to preserve her Fifth Amendment privilege against self-incrimination during interrogation in a "police-dominated atmosphere." *Illinois v. Perkins*, 496 U.S. 292, 296 (1989). The essential ingredients of a "police-dominated atmosphere" and compulsion are not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate. *Id.* Here, there is no evidence that officers were present during petitioner's conversations or that petitioner believed

Logins or Bier were undercover officers or state actors. Under these circumstances, admission of petitioner's statement to Logins and Bier did not violate the Fifth Amendment privilege against self-incrimination. *See id.*

Again, the Michigan Court of Appeals' resolution of the issue was neither contrary to, or an unreasonable application of, clearly established Federal law as determined by the Supreme Court; nor was the decision based on an unreasonable determination of the facts in light of the evidence presented. See *Williams v. Taylor*, 529 U.S. 362 (2000). Accordingly, petitioner is not entitled to habeas relief on this claim.

Recommendation

I respectfully recommend that petitioner's habeas petition be dismissed. Rule 8, Rules Governing § 2254 cases in the United States District Courts.

Entered: 7/29/02

Hugh W. Brenneman, Jr.
U.S. Magistrate Judge

ANY OBJECTIONS to this Report and Recommendation must be served and filed with the Clerk of the court within ten (10) days after service of this report. All objections and responses to objections are governed by W.D.Mich.LCivR 72.3(b). Failure to serve and file written objections within the specified time waives the right to appeal the District Court's order. *Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).